No. 18-16663

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF OAKLAND, *et al.*, *Plaintiffs-Appellants*,

v.

B.P. P.L.C., *et al.*, *Defendants-Appellees*.

On Appeal from the United States District Court, Northern District of California
Case Nos. 3:17-cv-06011-WHA, 3:17-cv-06012-WHA (Hon. William H. Alsup)

BRIEF OF LEGAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTEREST OF *AMICI CURIAE*

Amici are professors of property law, tort law, and related private law subjects at institutions across the United States.[1] *Amici* have extensive experience studying and teaching the doctrines of nuisance law, including the doctrines implicated by these cases, and share a scholarly interest in the proper application of those doctrines. With this brief, they seek to assist the Court by explaining the application of settled doctrines and theoretical principles that are relevant to the resolution of this appeal.

Amici submit this brief solely on their own behalf, not as representatives of their universities. *Amici*'s names are listed in Appendix A, with institutional affiliations provided solely for purposes of identification.

SUMMARY OF ARGUMENT

Because the Cities' complaints rest upon well-recognized California doctrines of public nuisance law, their state law claims should never have been removed from state court. The Cities' public nuisance abatement actions present the sort of claims that California tort law is well-equipped to address. Defendants—five of the largest investor-owned fossil fuel producers in the world—do not dispute that the

[1] The brief is submitted in accord with Fed. R. App. P. 29(a) and corresponding Ninth Circuit Rules. All parties have consented to the submission of amicus curiae briefs in this case. As required by Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

combustion of fossil fuels has led to global warming or that global warming has in turn led to sea level rise. Nor do they dispute that sea level rise threatens both Oakland and San Francisco, which are among the most impacted municipalities in the world.[2] And at this stage in the litigation, the Court must accept as true the Cities' allegations that Defendants knowingly misrepresented the risks of fossil fuel combustion while selling fossil fuels. *See* Oak. First Amended Complaint ¶¶ 95–123 ("Oak. FAC"); S.F. First Amended Complaint ¶¶ 95–123 ("S.F. FAC").

The question here, then, is which forum should decide whether these producers of fossil fuels should pay to abate the harms caused by that wrongful promotion. Whatever the complexities of climate change litigation against direct emitters of interstate pollution, the answer to that question is not complicated. California courts are well-equipped to decide how these cases fit within California law establishing that those who knowingly contribute to "the creation of a substantial and unreasonable interference with a public right" are liable to pay for abating the interference under the law of public nuisance. *See People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 79, 132–34 (2017) (holding that trial court "was well within [its] discretion" to order defendant manufacturers of lead paint "to deposit funds in an abatement fund, which would be utilized to prospectively fund

[2] *See generally* Manoochehr Shirzaei & Roland Burgmann, *Global Climate Change and Local Land Subsidence Exacerbate Inundation Risk to the San Francisco Bay Area*, Sci. Adv. 2018: 4 (Mar. 7, 2018).

remediation of the public nuisance"). This doctrine covers manufacturers that knowingly promote a hazardous product and thereby create a substantial and unreasonable hazard to public safety, health, and welfare. *See, e.g.*, *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal. App. 4th 292, 309 (2006). The Cities' state law complaints thus present recognized claims of public nuisance under California law that California courts should adjudicate.

Nuisance liability provides an efficient remedy, as it would force Defendants to internalize the costs of any wrongful promotion of fossil fuels. Cost internalization is among the principal aims of California tort law. *See, e.g.*, *Vasilenko v. Grace Family Church*, 3 Cal. 5th 1077, 1087 (2017). To date, Defendants have externalized the costs of their wrongful promotion of fossil fuels. The Cities' well-pleaded complaints allege that because of Defendants' wrongful promotion of overconsumption of fossil fuels, the Cities must take steps to mitigate the harmful impact of climate change on their communities. *See* Oak. FAC ¶¶ 124–136; S.F. FAC ¶¶ 124–136. California nuisance law provides a flexible legal mechanism to force Defendants to internalize those costs through supporting cost-justified adaptions to rising sea levels and climate-induced resource damage in the Bay Area, and the Cities are entitled to make their case in California court.

The District Court thus erred in concluding that the Cities' complaints present novel questions of federal law that are effectively not justiciable, and instead can be

decided only by Congress and the President. The District Court erred in treating the complaints as if they presented the same complexities as previous public nuisance suits against emitters of fossil fuels because the Cities do not seek to hold the emitters of greenhouse gases liable for their worldwide emissions. Rather, they seek only equitable abatement under California public nuisance law, which since 1872 has authorized such governmental actions against defendants whose conduct substantially contributes to a public nuisance. *See* Cal. Civ. Code § 3480; Cal. Civ. Proc. Code § 731. Tying relief to climate adaptation, as the Cities' complaints do, "keep[s] the scope of liability within manageable limits." Daniel A. Farber, *Basic Compensation for Victims of Climate Change*, 155 U. Pa. L. Rev. 1605, 1646–47 (2007) ["Farber, *Basic Compensation*"]. Under California tort law, those doctrinal limits are well defined, and there is a clear cost-internalization basis for holding Defendants liable to pay for abatement.

ARGUMENT

I. THE CITIES' COMPLAINTS PRESENT A RECOGNIZED CLAIM OF PUBLIC NUISANCE UNDER CALIFORNIA LAW.

The Cities' actions rest upon well-recognized principles of state public nuisance law. "There are few 'forms of action' in the history of Anglo-American law with a pedigree older than suits seeking to restrain nuisances, whether public or private." *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090 (1997). Under California law, such a suit has long been available to remedy wrongful promotion of a lawful

product when such promotion contributes to a substantial and unreasonable interference with a public right. The Cities allege that Defendants created precisely this sort of public nuisance by deliberately concealing their knowledge of the risks of fossil fuel use and wrongfully promoting expanded use of their products. *See* Oak. FAC ¶¶ 95–123; S.F. FAC ¶¶ 95–123. Such allegations present a claim under California law which Defendants can fight on the merits in state court. There was thus no warrant for removing these cases to federal court or dismissing them for failure to state a claim.

A. California Public Nuisance Law Is A Well-Established Vehicle For Remedying Harms Like Those The Cities Allege.

Since 1872, California law has authorized public actions against defendants that substantially contribute to public nuisances. *See* Cal. Civ. Code §§ 3479, 3480; Cal. Civ. Proc. Code § 731. Classic examples of public nuisances include obstructions of public roadways and pollution of waters near settlements. *See Gallo*, 14 Cal. 4th at 1103–04. But these classic examples do not define the universe. Rather, California nuisance law aims to respond flexibly to changing circumstances and new threats to public rights. An actionable public "nuisance" may include "[a]nything which is injurious to health . . . or [is] an obstruction to the free use of property," Cal. Civ. Code § 3479, that "affects at the same time an entire community or neighborhood, or any considerable number of persons," *id.* § 3480. Though not every interference with the public interest qualifies, intentional interference with

public rights is a public nuisance when the harm is "substantial and unreasonable." *Gallo*, 14 Cal. 4th at 1105 (emphasis omitted).

Environmental pollution is a paradigmatic public nuisance. California courts have not hesitated to find a nuisance when pollution harms air or water. *See, e.g.*, *Carter v. Chotiner*, 210 Cal. 288, 291 (1930) ("There is no doubt that pollution of water constitutes a nuisance and in a proper case will be enjoined."); *People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co.*, 107 Cal. 214, 219–20 (1895) (explaining that "pollution of the water [used by the public] by any unreasonable use [is] a public nuisance"); *Bowen v. Wendt*, 103 Cal. 236, 238 (1894) (holding that evidence showed that "defendant had been guilty of maintaining and committing a public nuisance by polluting the waters [of a stream]"); *Wade v. Campbell*, 200 Cal. App. 2d 54, 59 (1962) ("Conditions which amount in law to public nuisances include . . . dust, noise and grit from a cement plant."); *City of Turlock v. Bristow*, 103 Cal. App. 750, 755 (1930) (holding that where defendant obstructs waterway so as to threaten public health and safety, such a "condition clearly constitutes a public nuisance" for which a city may seek relief). The law of nuisance has long afforded relief for both private and public harms arising from environmental pollution, including the sorts of harms the Cities allege arise from Defendants' wrongful promotion of fossil fuels.

B. The Cities' Wrongful Promotion Claims Rest Upon An Established Basis For Public Nuisance Liability Under California Law.

Wrongful promotion of a lawful product forms a basis for liability under California public nuisance law when it contributes to a substantial and unreasonable interference with a public right. Although promotion of a lawful product, without more, does not sound in public nuisance, a manufacturer may be liable for a public nuisance when it wrongfully promotes a hazardous product with knowledge of the hazards and thereby creates a substantial and unreasonable risk to public safety, health, and welfare. *See ConAgra*, 17 Cal. App. 5th at 91–92; *Santa Clara*, 137 Cal. App. 4th at 309; *Ileto v. Glock*, 349 F.3d 1191, 1194, 1210–15 (9th Cir. 2003); *cf. City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal. App. 4th 28, 42 (2004) (reasoning that public nuisance liability may lie when a defendant "specifically instructed a user to dispose of wastes" in manner that would create a nuisance); *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.*, 221 Cal. App. 3d 1601, 1621–24 (1990) (holding that chemical companies could be liable for failure to warn of hazards they knew or should have known would arise from improper disposal of chemicals), *disapproved of in part on other grounds*, *Johnson v. American Standard, Inc.*, 43 Cal. 4th 56, 70 (2008).

In *County of Santa Clara v. Atlantic Richfield*, for example, the court of appeal held that cities had alleged an actionable public nuisance based upon lead manufacturers' wrongful promotion of lead paint. 137 Cal. App. 4th at 305–06. The

complaint alleged that the presence of lead in homes in their jurisdictions threatened the public health, *and* that the manufacturers contributed to the creation of this threat by promoting the use of lead paint while failing to warn the public of known risks and by trying to discredit evidence of those risks. *See id.* at 304–05. The local governments sought abatement as a remedy. *See id.* at 305. In rejecting the manufacturers' argument that product liability law provided the exclusive cause of action, the court of appeal concluded that the complaint "[c]learly . . . was adequate to allege the existence of a public nuisance for which these entities, acting as the People, could seek abatement." *Id.* at 306. And the manufacturers could be held liable for abatement of this nuisance because they "assisted in [its] creation . . . by concealing the dangers of lead, mounting a campaign against regulation of lead, and promoting lead paint for interior use even though" they knew of the hazards it created. *Id.*

California public nuisance law thus addresses widespread harm from wrongfully promoted products and "is not intended to serve as a surrogate for ordinary products liability." *Santa Clara*, 137 Cal. App. 4th at 308 (quoting *Modesto*, 119 Cal. App. 4th at 39). *Santa Clara* distinguished product liability cases, where a plaintiff seeks damages for personal injury, from representative public nuisance actions in which the government seeks "*abatement* of a hazard created by affirmative and knowing *promotion of a product for a hazardous use*." *Id.* at 309

(emphasis in original). So, while a simple failure to warn claim is not actionable as a public nuisance, a defendant "who manufactured equipment designed to discharge waste in a manner that will create a nuisance, or who specifically instructed a user to dispose of wastes in such a manner" could be found liable for public nuisance. *Modesto*, 119 Cal. App. 4th at 36–37, 41–42.

In other words, California law distinguishes public nuisance liability—where wrongful promotion of a hazardous product substantially contributes to widespread harm that a government is best positioned to redress as a representative plaintiff—from product liability claims brought to redress individual harms from manufacturing defects or failures to warn. A representative action for abatement premised upon wrongful promotion addresses "far more egregious" conduct than does a product liability claim and provides "an avenue to prevent future harm from a hazardous condition" by "allow[ing] a public entity to act on behalf of a community that has been subjected to a widespread public health hazard." *Santa Clara*, 137 Cal. App. 4th at 310.

The Cities' complaints fall squarely within this type of public nuisance action. As in *Santa Clara*, the complaints allege that manufacturers of an otherwise lawful product contributed to a public nuisance by knowingly promoting a hazardous product while concealing its risks and trying to discredit evidence of those risks. *See* Oak. FAC ¶¶ 95–123; S.F. FAC ¶¶ 95–123. Furthermore, as in *Santa Clara*, the

complaints allege that such wrongful promotion contributed to the creation of a substantial and unreasonable threat to the public health, safety, and welfare. *See* Oak. FAC ¶ 140; S.F. FAC ¶ 140. And as in *Santa Clara*, the complaints seek to mitigate future harm through an equitable abatement remedy. *See* Oak. FAC ¶ 142; S.F. FAC ¶ 142. The Cities' public nuisance complaints state a California cause of action that California courts are well-positioned to evaluate.

II. AN EQUITABLE ABATEMENT REMEDY WOULD FURTHER CALIFORNIA TORT LAW'S GOAL OF HAVING WRONG-DOERS INTERNALIZE THE COSTS OF INJURIES THEY CAUSE.

The Cities' proposed remedy—holding Defendants liable to support an abatement fund—would achieve California tort law's aim of internalizing the costs of harms. This important goal is also supported by longstanding principles of the law and economics of tort. Public nuisance law "enhanc[es] economic efficiency by forcing cost-internalization" when an actor's activities have significant costs for society. Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 Ecology L.Q. 755, 775 (2001). And where a court may be uncertain "whether a benefit is worth its costs to society," an economic account of tort law counsels imposing the costs "on the party or activity best located to make such a cost-benefit analysis," that is, imposing liability upon the cheapest cost avoider. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1096 (1972).

The Cities have alleged that Defendants' wrongful promotion of fossil fuel use substantially contributed to significant harm to Bay Area communities. Principles of law and economics demonstrate that Defendants are in the best position to avoid that harm at the lowest cost.

A. California Tort Law Recognizes The Cost-Internalization Justification For Tort Liability.

A longstanding law and economics account of nuisance law focuses on its potential to force actors to internalize the societal costs of injuries that they cause. The economic goal of tort law is to promote social welfare through efficient deterrence, which aims to minimize the sum of the costs of preventing harms, the costs arising from harms, and the costs of administering the tort system. *See* Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* 26–29 (1970) ["Calabresi, *Costs of Accidents*"]. Public nuisance law achieves these goals by having defendants internalize the costs of their harmful activities.

This analysis begins with the assumption that rational entities weigh costs and benefits in deciding whether (and how much) to engage in an activity. Their activities may very well have harmful effects—that is, impose costs—upon others, but a self-interested actor will take into account only the costs that it bears. *See* Robert Cooter & Thomas Ulen, *Law and Economics* 261–62 (2d ed. 1997). The harms involved in nuisance actions, whether a neighbor's barking dogs or a factory's discharge of harmful pollutants, are negative externalities that tort law may address

either through injunctive relief or damages. *See, e.g.*, Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 Harv. L. Rev. 713, 754 (1996). By imposing liability, tort law forces actors to internalize their negative externalities. And by forcing actors to bear these costs, tort law aims to incentivize them to take cost-justified precautions against future harm.

Cost internalization is among the principal aims of California tort law, including the law of public nuisance. The California Supreme Court has repeatedly recognized that "[t]he policy of preventing future harm is ordinarily served by allocating costs to those responsible for the injury and thus best suited to prevent it," and that "internalizing the cost of injuries caused by a particular behavior will induce changes in that behavior to make it safer." *Vasilenko*, 3 Cal. 5th at 1087 (internal quotations omitted); *see also Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 502 (2001) (discussing the "cost-internalization values of negligence liability").

California nuisance law reflects this cost-internalization aim. Even when (unlike here) there is no allegation that a tortfeasor's conduct is otherwise wrongful, the creation of a substantial and unreasonable public harm alone can justify requiring the tortfeasor to internalize those costs.[3] In a seminal public nuisance case, *People*

[3] Lindsay F. Wiley, *Rethinking the New Public Health*, 69 Wash. & Lee L. Rev. 207, 237 (2012) ("Public nuisance is generally understood as a form of strict (or 'no fault') liability, at least in the context of suits brought by governmental plaintiffs.").

v. Gold Run Ditch & Mining Co., 66 Cal. 138, 151 (1884), the California Supreme Court made clear that an otherwise "legitimate private business" may create a public nuisance by imposing costs upon the public. There, the state sued for injunctive relief against a California mining corporation that was discharging rocks, dirt, and other debris into a river. The defendant argued that its discharges were founded upon a custom among the mining industry, one in which "the people of the state have silently acquiesced." *Id.* at 151. Even so, the Court explained, "a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and when it develops in that condition the custom upon which it is founded becomes unreasonable." *Id.* Therefore, the Court held, the defendant's discharges into navigable waters had caused a public nuisance. *Id.* Public nuisance law thus provided a remedy where an otherwise lawful business, one carried on in conformance with local custom, engaged in activities that imposed harm upon the public.

Here, of course, the Cities do not premise liability upon an unlawful discharge, but instead allege that Defendants intentionally concealed knowledge of the hazards of an otherwise lawful product and wrongfully promoted expanded use of that product. *See* Oak. FAC ¶¶ 95–123; S.F. FAC ¶¶ 95–123. But here too, public nuisance liability provides a mechanism for forcing Defendants to internalize the

costs of their harmful activities. Nuisance law provides a flexible set of remedies to achieve this goal, including the equitable abatement remedy the Cities seek here.

B. Fossil Fuel Producers Are Likely The Best Cost Avoiders.

Contrary to the District Court's reasoning, analyzing the Cities' claims for equitable abatement under settled California public nuisance law would not entail enjoining fossil fuel emissions nor demand judicial balancing of the worldwide costs and benefits of those emissions. Rather, settled economic principles of tort law and California nuisance law would support a remedy requiring payment of abatement costs because Defendants are likely the cheapest cost avoiders of the harms arising from their wrongful promotion of fossil fuels.

The Cities' public nuisance complaints do not rest upon balancing the global costs and benefits of fossil fuel emissions. They rest instead upon allegations that the harms from Defendants' wrongful promotion are "severe" and, therefore, equitable abatement is appropriate. *See* Oak. FAC ¶ 147; S.F. FAC ¶ 147. This theory of nuisance liability is cognizable under California law and reflects established principles that apply to both private and public nuisances. *See Wilson v. S. Cal. Edison Co.*, 234 Cal. App. 4th 123, 162 (2015) (quoting Restatement (Second) of Torts § 829A (Am. Law. Inst. 1979)) (explaining that nuisance liability may be found "when 'the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation'"); *see* Restatement

(Second) of Torts § 821B cmt. i (Am. Law Inst. 1979) ("Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it.").

Where there may be uncertainty about costs and benefits, a basic principle of law and economics counsels putting liability upon the party that can avoid the harm at the lowest cost. As developed by Judge Guido Calabresi and Jon Hirschoff in the context of strict liability, the cheapest cost avoider principle "does not require that a governmental institution make [the] cost-benefit analysis." Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055, 1060 (1972). Instead, "[t]he question for the court reduces to a search for the cheapest cost avoider," that is, the party that "is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." *Id.* (emphasis omitted); *see* A. Bryan Endres & Lisa Schlessinger, *Pollen Drift: Reframing the Biotechnology Liability Debate*, 118 Penn St. L. Rev. 815, 850 (2014) ("[T]he least-cost avoider test is more efficient than waiting for a full cost-benefit analysis by the courts . . . ."); *Union Oil Co. v. Oppen*, 501 F.2d 558, 569 (9th Cir. 1974) ("[T]his approach requires the court to fix the identity of the party who can avoid the costs most cheaply. Once fixed, this determination then controls liability.").

Identifying the cheapest cost avoider requires a comparative analysis for which scholars and courts have identified several guidelines. First, the analysis necessarily requires comparison of each party's ability to avoid the harms. *See Union Oil*, 501 F.2d at 569. Such analysis should take into account each party's ability to obtain insurance against the harm. *See* Guido Calabresi, *Views and Overviews*, 1967 U. Ill. L.F. 600, 606 ["Calabresi, *Views and Overviews*"]. In drawing this comparison, a court may make a "rough calculation designed to exclude as potential cost-avoiders those groups/activities which could avoid accident costs only at an extremely high expense." *Union Oil*, 501 F.2d at 569 (citing Calabresi, *Costs of Accidents*, *supra*, at 140–43). Second, the court may look to "the administrative costs which each party would be forced to bear in order to avoid the accident costs." *Id.* (citing Calabresi, *Costs of Accidents*, *supra*, at 143–44). Third, "the loss should be allocated to that party who can best correct any error in allocation, if such there be." *Id.* (citing Calabresi, *Costs of Accidents*, *supra*, at 150–52). And fourth, a court should take into account the risk that "[p]lacing the cost on one activity rather than another may . . . destroy[] market deterrence altogether." Calabresi, *Views and Overviews*, *supra*, at 606.

Scholars have concluded that fossil fuel companies are the likely cheapest cost avoiders in the case of climate change. *See* Jonathan Zasloff, *The Judicial Carbon Tax: Reconstructing Public Nuisance and Climate Change*, 55 UCLA L. Rev. 1827,

1834 (2008) (arguing that fossil fuel producers and automakers are "cheaper cost avoiders than consumers"); Eduardo M. Peñalver, *Acts of God or Toxic Torts? Applying Tort Principles to the Problem of Climate Change*, 38 Nat. Res. J. 563, 573 (1998) (arguing that fossil fuel companies are in the best position to make the cost-benefit analysis, as they "have an enormous amount of resources with which they can purchase the expertise needed to assess the often conflicting information about climate change and its expected costs").

Defendants, of course, would have the opportunity to argue the issue after remand, but each of the guidelines points towards Defendants as the cheapest cost avoiders. First, and most obviously, Defendants have better information about the risks of fossil fuel use, information that, according to the complaints, they deliberately suppressed from the public.

Second, the victims of climate change are not in a good position to avoid the harms or to insure themselves against it. *See* Zasloff, *supra*, at 1834, 1838. According to City of Oakland's complaint, for example, those most likely to be affected by climate change in the City are "'socially vulnerable' individuals such as African Americans, Hispanics and other people of color [who] tend to live at lower elevations most affected by sea level rise and higher storm surges." Oak. FAC ¶ 135. As the "magnitude of the actions needed to abate harms from sea level rise and

the amount of property at risk" increase with "rapidly accelerating sea level rise," the Cities will face increasingly costly adaptation needs. *Id.* ¶ 131.

Third, Defendants can "spread costs to shareholders or consumers," and face lower administrative and transaction costs than the potential victims of climate change, who face collective action barriers to pooling resources and paying Defendants to reduce fossil fuel production. *See generally* Daniel A. Farber, *Adapting to Climate Change: Who Should Pay*, 23 J. Land Use & Envtl. L. 1, 30 (2007) (explaining that fossil fuel polluters are "in a good position to spread the costs to shareholders or consumers"); Zasloff, *supra*, at 1835 ("The point isn't that bribing the defendants is impossible, but rather that it involves far greater transaction costs than the other alternative.").

And fourth, when the costs fall upon the public, "governments will have little choice but to step in, leaving market deterrence unavailable." Zasloff, *supra*, at 1835. Given resource constraints, however, underinvestment in adaptation measures is likely if the costs are born entirely by local governments. *Cf.* S.F. FAC ¶ 134 (explaining that cities need to invest now in long-term "planning, financing, and implementation" so that "abatement of ongoing and future sea level rise harms is done most efficiently").

The Cities, in short, have sued the proper defendants under the proper theory of liability. And they are entitled to make their case under California's public

nuisance law that basic economic principles support imposition of tort liability upon Defendants as the cheapest cost avoiders.

III. THE DISTRICT COURT ERRED IN REMOVING AND DISMISSING THE CITIES' COMPLAINTS.

Because the Cities' complaints rest upon well-recognized California public nuisance law, their state law claims should never have been removed from state court. Nor should their suits have been dismissed on the ground that "regulation of the worldwide problem of global warming should be determined by our political branches." D. Ct. Dkt. 283, at 15. The Cities do not seek to shut down Defendants' operations, only to require Defendants to internalize the costs of their wrongful promotion of fossil fuels and thereby to fund the construction of sea walls and other necessary adaptation measures. Nor is causation the hurdle the District Court supposed. Under well-established tort law principles, each Defendant who substantially contributes to a nuisance shares the liability.

A. The Cities' Complaints Seek An Established Form Of Relief Available In State Court.

The District Court held that the Cities' complaints were removable because they were "necessarily governed by federal common law." D. Ct. Dkt. 134, at 3. This flawed conclusion was based upon its erroneous characterization of the Cities' public nuisance claim as one that "address[es] the national and international geophysical phenomenon of global warming." *Id.* Not so. The Cities' claims are

focused not upon generalized global harm, but rather upon Defendants' wrongful promotion of a hazardous product and the need to abate specific resulting harms in their jurisdictions.

Such well-recognized public nuisance claims under California law do not require a court to regulate greenhouse gas emissions. While fossil fuel emissions are a link in the causal chain between Defendants' allegedly wrongful actions and the Cities' alleged harms, the Cities' public nuisance claims do not seek to hold Defendants liable for those emissions. Instead, the Cities seek to hold Defendants liable for their wrongful promotion that "assisted in the creation" of a hazardous condition. *Santa Clara*, 137 Cal. App. 4th at 306. That is an established form of relief that arises under state law, not federal law.

Contrary to the District Court's conclusion on the merits, moreover, there is no problem of "timing" with the Cities' complaints for an equitable abatement remedy. *See* D. Ct. Dkt. 283, at 8 n.8. The District Court reasoned that the Cities cannot recover because they "have yet to build a seawall or other infrastructure for which they seek reimbursement." *Id.* As the District Court saw it, the Cities are "walking to the pay window before the race is over." *Id.* at 9. But the Cities allege that the race to adapt to rising sea levels began decades ago, when Defendants were wrongfully promoting fossil fuel use while suppressing evidence of its risks.

The District Court's reasoning rests upon a threadbare view of tort law. Tort law remedies allow not only for ex post compensation, but also for ex ante compensatory relief to fund precautionary actions. *See* Farber, *Basic Compensation*, *supra*, at 1635–36. Under California law, for example, a plaintiff in a toxic tort case may recover forward-looking compensation for future medical monitoring needs. *See Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1006–07 (1993) (holding that "a reasonably certain need for medical monitoring is an item of damage for which compensation should be allowed"). Such relief does not require a court "to speculate about the probability of future injury," but rather to "ascertain the probability that the far less costly remedy of medical supervision is appropriate." *Id.* (internal quotations omitted). Similarly here, a remedy would be appropriate to fund forward-looking adaptation measures for which a "reasonably certain need" is proven. Moreover, the Cities have sought a forward-looking remedy in equity, which is flexible enough to accommodate relief where they can demonstrate that adaptation is needed in response to the threat of catastrophic harm.[4]

[4] Under California public nuisance law, moreover, the Cities may not sue in a representative capacity to "recover . . . any funds that [they have] already expended to remediate a public nuisance." *ConAgra*, 17 Cal. App. 5th at 132; *see Orange Cty. Water Dist. v. The Arnold Eng'g Co.*, 196 Cal. App. 4th 1110, 1125 n.4 (2011) (noting that in action to abate a public nuisance, "public entity may not recover monetary damages").

B. The Cities' Suits Do Not Require The Court To Balance All The Costs And Benefits Of Fossil Fuel Use.

Because the unreasonableness element of nuisance law is focused upon the harm to the plaintiff, not upon the defendant's conduct, the Cities' complaints do not require a court to balance all the costs and benefits of fossil fuel use across the globe. *See Wilson v. S. Cal. Edison Co.*, 21 Cal. App. 5th 786, 804 (2018) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 88 at 629 (5th ed. 1984) ["Prosser & Keeton"]) ("'[T]he intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable."). No shutdown of Defendants' operations is on the table, only a requirement to internalize the costs imposed on several California coastal cities by Defendants' wrongful promotion of fossil fuels and thereby to fund the construction of sea walls and other necessary adaptation measures. Because Defendants are likely the cheapest cost avoiders here, they are best-equipped to devise strategies to prevent harm, if California courts determine their wrongful conduct caused those harms.

Courts have long provided similar remedies in public nuisance actions, regardless of the utility of defendants' conduct. For example, in the landmark *Boomer* case, the New York Court of Appeals held that the defendant's cement plant created a nuisance by causing air pollution, harming plaintiffs' properties. *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 225 (1970). Because, however, the economic value of the cement plant substantially outweighed the value of plaintiffs'

properties, the court did not permanently enjoin the plant's operation. *Id.* at 225–26. Instead, it permitted the plant to continue operating as long as the defendant compensated the plaintiffs for their harms, reasoning that this approach "would itself be a reasonable effective spur" to incentivize the defendant "to minimize nuisance." *Id*. at 226.

The Cities here have requested an abatement fund, not a permanent injunction shutting down the Defendants' operations. Providing this equitable remedy does not require a macro cost-benefit analysis of the utility of fossil fuel production. *See* Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 Yale L.J. 647, 674 (1971). Moreover, such an award is likely to be superior to a permanent injunction where, as here, the alleged nuisance is of "substantial magnitude" and "bargaining [is likely to be] imperfect due to asymmetric information." Kaplow & Shavell, *supra*, at 755. And, as in *Boomer*, it may spur improvements that minimize harm. *See* 26 N.Y.2d at 226.

C. The Cities' Complaints Rest Upon Well-Recognized Principles Of Causation In Nuisance Cases.

If the Cities have their day in court, as California law allows, they can seek to hold Defendants liable for their contributions to the harms that the Cities are suffering, under fundamental tort law principles of causation.

The plaintiff in a public nuisance case need not demonstrate that the defendant's action was the sole but-for cause of the harm to public rights. Thus, the

District Court was doubly wrong in applying a stringent causation standard to the jurisdictional analysis, not only because it was premature, *see* Cities Br. 52, but also because it was too strict even for the merits stage. In *Gold Run*, the mining company defendant argued that it could not be held liable under the law of public nuisance for harm that arose from its and other mining companies' independent decisions to dump debris into a river, on the theory that "the acts of the defendant cannot be joined with the acts of other mining companies to create a cause of action against the defendant." 66 Cal. at 148. The California Supreme Court rejected this argument, concluding that a court may issue an equitable remedy to abate a public nuisance against "all persons engaged in the commission of the wrongful acts which constitute the nuisance." *Id.* at 149.

It is now well settled that causation in nuisance law does not require proof that a defendant was the sole but-for cause. Rather, as the Restatement (Second) explains, "the fact that other persons contribute to a nuisance is not a bar to the defendant's liability for his own contribution." Restatement (Second) of Torts § 840E (Am. Law Inst. 1979); *see also* Prosser & Keeton, *supra*, § 52 ("A number of courts have held that acts which individually would be innocent may be tortious if they thus combine to cause damage, in cases of pollution."); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 696–97 (7th Cir. 2008) (quoting Prosser & Keeton, *supra*, § 52, at 354) ("Even if the amount of pollution caused by each party

would be too slight to warrant a finding that any one of them had created a nuisance, . . . 'pollution of a stream to even a slight extent becomes unreasonable . . . when similar pollution by others makes the condition of the stream approach the danger point.'"). To hold otherwise would undermine the public nuisance cause of action in environmental pollution cases, where it has a long history of providing relief to protect public rights. *See, e.g.*, *Gold Run*, 66 Cal. at 149.

As the California Supreme Court has recognized, "advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer." *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 610 (1980). California thus eschews a strict but-for causation requirement in some cases, to ensure recovery and efficient deterrence. In recognizing the doctrine of market share liability, for example, the California Supreme Court explained that tort law should aim to place liability upon the cheapest cost avoider in order to "provide an incentive to product safety." *Id.* at 611.

So too here, the Cities argue that Defendants are in the best position to avoid harm. *See supra* pp. 13–18. Under widespread and well-established principles of nuisance law, Defendants may not avoid liability by arguing that none of them were individually the sole but-for cause of the Cities' alleged harms. Rather, where public nuisance liability is premised upon wrongful promotion, a plaintiff may satisfy the causation element by alleging that the defendant's conduct "is a substantial factor in

bringing about the result." *ConAgra*, 17 Cal. App. 5th at 101. Under this substantial factor test, the Cities need only show that Defendants' "affirmative promotions . . . played at least a 'minor' role in creating the nuisance that now exists." *Id.* at 102. Whether their wrongful promotion "was 'too remote'" from the Cities' alleged harms is "a question of fact for the trial court." *See id.* at 104 (explaining that this question of proximate causation is one for the jury unless there is "undisputed evidence" from which "a court may properly decide that no rational trier of fact could find the needed nexus" (internal quotations omitted)). Causation is therefore fairly pled under California law.

These principles of nuisance law illustrate the wrong turns in the District Court's personal jurisdiction analysis. This Court has a three-pronged test for specific personal jurisdiction. This test requires (1) that the defendant purposefully directed its activities at the forum state, (2) that the plaintiffs' claim "arises out of or relates to the defendant's forum-related activities," and (3) that the exercise of jurisdiction comports with fair play and substantial justice. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1205–06 (9th Cir. 2006).

With respect to the second prong, the District Court wrongly concluded that the Cities had to show, but could not, that their harms from sea level rise would not have occurred but for each of Defendants' independent "*California-related* activities." D. Ct. Dkt. 287, at 5. But the personal jurisdiction analysis under this

test "depends, to a significant degree, on the specific type of tort . . . at issue." *Picot v. Weston*, 780 F.3d 1206, 1214 (9th Cir. 2015) (internal quotation marks omitted). And the specific type of tort at issue in this case—a multidefendant public nuisance claim—does not require proof that each of the defendants are independent, but-for causes of the alleged harms. *See* Cities Br. 57 ("The proper inquiry should have been whether Defendants' purposefully directed conduct led to *increased* sea-level rise and *increased* harms to the local environment and public infrastructure, which is precisely what the People alleged."). The District Court's demanding standard is not consistent with California public nuisance law. And far from presenting a novel innovation of federal common law, unbounded in geographic scope, California's public nuisance law provides a comprehensive framework for evaluating claims like the Cities that seek abatement of local harms.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed and remanded with instructions to remand the case to state court.

Date: March 20, 2019

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APPENDIX A

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CERTIFICATE OF COMPLIANCE

Counsel for *Amici* Law Professors certifies:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Ninth Circuit Rule 32-1. This brief contains 6,634 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on March 20, 2019. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service pursuant to Federal Rule of Appellate Procedure 25(c)(2) and Ninth Circuit Rule 25-5.

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